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Admitted in PA and NJ

May 24, 2018

Via Electronic (Rice.scott@Epa.gov) and
Overnight Mail (Tuesday Delivery)
Mr. Scott Rice
Toxics Program Branch (3LC41)
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Re: EPA Notice of Non-Compliance
Docket No. 03-18-0026

Dear Mr. Rice:

On April 26, 2018, Bethlehem Earth, L.P. ("BE") received a Notice of Non-Compliance and Information Request (the "Notice") from the United States Environmental Protection Agency ("EPA") regarding soils that are being used to facilitate the commercial redevelopment of property owned by BE located on Easton Road in Bethlehem, Pennsylvania (the "Bethlehem Site"). In the Notice, EPA asserts that the receipt and use of soils containing polychlorinated biphenyls ("PCBs") at concentrations of 2 parts per million ("ppm") or greater violates requirements under the Toxic Substances Control Act ("TSCA") even if the receipt and use of such soils is fully authorized under state law. The Notice seeks various types of information regarding soils that have been received by BE at the Bethlehem Site with PCB concentrations of 2 ppm or greater as part of the ongoing process to redevelop the Bethlehem Site. EPA requested that such information be provided to EPA within 30 days after receipt of its letter. The purpose of this submission is to respond to the Notice on behalf of BE.

We note that the Notice also requests information regarding the "Freemansburg Avenue Site in Freemansburg, PA." BE has never owned nor operated a site in Freemansburg, Pennsylvania. BE therefore limits its response to the Notice to information relating to the Bethlehem Site.

In the Notice, EPA alleges that BE violated requirements contained in regulations titled Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions codified at 40 C.F.R. Part 761 (the "PCB Regulations") because of the purported

acceptance at the Bethlehem Site of soils containing PCBs in concentrations of 2 ppm or greater from three different sources, identified as: (1) DRP Gibbstown Logistics, Gibbstown, New Jersey; (2) PANYNJ/Greenville Yard, 20 Colony Road, Jersey City, New Jersey; and (3) KLS Lodi, Lodi CVS/LA Fitness Redevelopment, Lodi, New York (collectively the "Identified Source Sites"). Contrary to EPA's assertions, BE has never accepted *any* fill material from any of the Identified Source Sites. Although BE did secure authorization from the Pennsylvania Department of Environmental Protection ("PADEP") to accept fill from the Gibbstown and Jersey City sites, BE ultimately elected not to accept any material from either of these sites. With respect to the Lodi site, not only did BE not accept any fill material from that site, but BE never even sought authorization from PADEP to accept fill material from the Lodi site at the Bethlehem Site.

Background of the State Regulatory Regime

At the outset, we note that the Notice implicates important issues that go to the heart of the interrelationship between regulatory programs administered by federal and state government respectively. While both have important roles to play, the positions that EPA has advanced in its letter suggest that EPA is largely disregarding a mature and well-developed framework that PADEP has created to enable soils and other types of materials to be beneficially used in Pennsylvania even in circumstances where those soils and other materials may contain PCBs. As such, EPA's actions are inconsistent with the model of "cooperative federalism" that is to inform EPA's actions.

Since 2004, PADEP has authorized the use of soils and other materials in Pennsylvania that qualify as "clean fill" pursuant to a regulatory guidance document titled *Management of Fill Policy* that was developed under the authority of the Pennsylvania Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.101 – 6018.1003. The *Management of Fill Policy* authorizes the use of soils, rock, stone, brick, block, concrete, dredge material and used asphalt as clean fill where due diligence does not indicate that those materials have been impacted by a spill or release of regulated substances. The *Management of Fill Policy* also includes numeric standards for fill material that has been impacted by a spill or release of regulated substances (including PCBs) for purposes of determining whether the fill material can qualify as clean fill. Those numeric standards are based on conservative numeric cleanup standards that PADEP has developed to implement the statewide health standard under the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.909.

The numeric standards for evaluating whether fill material qualifies as clean fill have been determined by PADEP to be sufficiently protective of human health and the environment to allow fill material constituting clean fill to be used without being subject to regulatory restrictions. PADEP has issued a form designated as FP-001 – Certification of Clean Fill. The information to be included in Form FP-001 includes a description of the clean fill that is to be transferred, the location from which the fill material originated and the location where the fill material is expected to be used. Although there are no statutory or regulatory requirements

mandating the use of Form FP-001, the directions to Form FP-001 indicate that Form FP-001 is to be submitted to PADEP and retained by the person making the determination that the fill material qualifies as clean fill and the user of the fill material. (We note that PADEP's policy of mandating the use of Form FP-001 is inconsistent with the notion that materials qualifying as clean fill may be used without being subject to regulation).

As a companion to the *Management of Fill Policy*, PADEP also issued a general permit under the SWMA to enable soils and other materials that do not qualify as clean fill nevertheless to be beneficially used as a construction material subject to various restrictions determined by PADEP to be protective of human health and the environment.[1] This general permit is referred to as WMGR096 and covers a class of fill material known as "regulated fill." General permit WMGR096 authorizes the use of regulated fill only in connection with projects at nonresidential properties (such as industrial and commercial properties), and includes numeric standards for materials qualifying as regulated fill (including PCBs). The numeric standards in general permit WMGR096 are likewise based on conservative numeric cleanup standards that PADEP has developed to implement the statewide health standard under Act 2, but utilize nonresidential cleanup standards due to the nonresidential nature of sites that can qualify to use regulated fill pursuant to general permit WMGR096.

To accept regulated fill under general permit WMGR096, the receiving facility must apply for and receive authorization from PADEP. And in order for PADEP to authorize a receiving facility to accept a proposed source of regulated fill, extensive information must be submitted to PADEP to demonstrate that the fill material satisfies the requirements of general permit WMGR096. Further, PADEP does not "rubber stamp" authorizations for proposed regulated fill sources, but instead undertakes a thorough review of each application package, often resulting in supplemental information requests or questions from PADEP that must be addressed prior to securing PADEP approval.

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[1] A construction material is defined under Pennsylvania's residual waste regulations as follows:

> The engineered use of residual waste as a substitute for a raw material or a commercial product in a construction activity, if the waste has the same engineering characteristics as the raw material or commercial product for which it is substituting. The term includes the use of residual waste as a road bed material, for pipe bedding, and in similar operations. The term does not include valley fills, the use of residual waste to fill open pits from coal or other fills, or the use of residual waste solely to level an area or bring the area to grade where a construction activity is not completed promptly after the placement of the solid waste.

25 Pa. Code § 287.1.

Redevelopment of the Bethlehem Site

On July 28, 2014, BE received authorization from PADEP to operate under general permit WMGR096-NE004 (the version of general permit WMGR096 issued to BE) (the "Regulated Fill Permit"). A copy of the Regulated Fill Permit is attached hereto as Exhibit A. This authorization allows BE to receive regulated fill to be beneficially used as a construction material at the Bethlehem Site in accordance with the terms of the Regulated Fill Permit. BE plans to redevelop the Bethlehem Site into 66+/- flat usable acres on which three commercial/ industrial buildings and associated infrastructure will be constructed. The buildings will prevent exposure to soils beneath their footprints. The buildings will consist of a 400,000 s.f. industrial warehouse building, and two smaller commercial/industrial buildings. A site plan showing the proposed commercial/industrial buildings is enclosed with this letter as Exhibit B. To complete the redevelopment of the site, approximately 4,500,000 tons of fill, consisting of both clean fill and regulated fill, will need to be imported to the Bethlehem Site, with some portions of the site requiring the placement of more than 60 feet of fill material to achieve level, final construction grades. Filling activities are anticipated to take an additional five years to complete, followed by two to five years to complete construction of the buildings themselves.

The Bethlehem Site is zoned for commercial and industrial use, and sits immediately adjacent to the Majestic Bethlehem Center, a 441 acre master planned intermodal and business park. Pursuant to the terms of the Regulated Fill General Permit, a deed acknowledgment will be recorded that contains the locations where regulated fill has been placed at the Bethlehem Site. The deed acknowledgment must include the longitude and latitude of the locations where regulated fill has been placed at the Bethlehem Site, and a description of the types of fill identified by sampling and analysis. The deed acknowledgement will be recorded upon the completion of the redevelopment project.

Scope of Relevant Requirements under TSCA

While Section 6(e) of TSCA and the PCB Regulations generally prohibit the manufacture, processing, distribution in commerce, and use of PCBs, this prohibition is applied in a far more nuanced manner than EPA suggests in the Notice. For example, despite this general prohibition, EPA has determined that "activities involving products containing less than 50 ppm PCB generally do not present an unreasonable risk of injury to human health or the environment." 53 Fed. Reg. 24206, 24208 (Jun. 27, 1988). EPA's analyses demonstrated that "the incremental risks associated with the processing, distribution in commerce, and use of products with PCB levels up to 50 ppm are outweighed by the tremendous costs that would be incurred by banning the further processing, distribution in commerce, and use of PCBs at these levels." *Id.* EPA justified the exclusion of certain materials and activities, in part, by acknowledging that non-TSCA regulatory programs govern certain practices involving PCBs at concentrations of less than 50 ppm. *Id.* As a result, the regulations implementing TSCA are filled with exceptions and authorizations narrowing the scope of TSCA and allowing the use of an array of materials containing PCBs at concentrations below 50 ppm.

One notable exclusion from the scope of the use limitations under TSCA is for the use of excluded PCB products. 40 C.F.R. § 761.20(a)(1). Excluded PCB products are defined as "PCB materials which appear at concentrations less than 50 ppm." 40 C.F.R. § 761.3. The definition of excluded PCB products contains a non-exclusive illustrative set of examples that includes "[p]roducts contaminated with Aroclor or other PCB materials from historic PCB uses." *Id.* The regulations make clear that the definition of excluded PCB products is "not limited to" the examples enumerated in the regulations. *Id.* Even wastes containing PCBs at concentrations less than 50 ppm have been determined to be excluded PCB products.[2]

TSCA also excludes from the scope of its authority certain PCB remediation wastes. For example, wastes containing PCBs at concentrations of less than 50 ppm that are a result of a spill or release occurring before April 18, 1978, fall outside of the scope of TSCA. *See* 40 C.F.R. § 761.3 (defining PCB remediation waste). In particular, in technical guidance that appears to be directly relevant to the use of fill material containing PCBs at concentrations below 50 ppm, EPA stated as follows:

> Q: I found PCBs in soil at concentrations <25 ppm from an old release. May I move this soil freely on-site? May I move it to another site? May I use it as fill?
>
> A: Yes. The PCB disposal rules do not apply to waste that is currently <50 ppm that was disposed of, spilled, or otherwise released into the environment prior to April 18, 1978.

EPA PCB Question and Answer Manual, p. 47, Jun. 2014.

It is BE's position that these two, broad exclusions under TSCA provide broad authority for excluding any regulated fill or clean fill that BE may have imported to the Bethlehem Site with PCB concentrations of 2 ppm or greater (but in concentrations of less than 50 ppm) from the scope of TSCA's use prohibitions. Although some of the regulated fill that has been used at the Bethlehem Site contains PCBs at concentrations of 2 ppm or greater, none of the regulated fill contains PCBs at concentrations of 10 ppm or greater. Further, none of the regulated fill used at the Bethlehem Site came from sources with known PCB spills or releases, but instead originated from locations where unclassified historic fill material has been excavated in connection with redevelopment projects.[3] Low levels of PCBs were only identified through sampling of the historic fill in anticipation of the reuse of that fill material. Based on the nature

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[2] *In re: Environmental Protection Services, Inc.*, 13 EAD 506, fn. 8 (Feb. 15, 2008)

[3] As EPA is certainly aware, many urbanized areas are located near rivers and other water bodies. Large portions of these areas were historically filled many decades ago in order to facilitate development. As redevelopment and revitalization projects proceed in these areas, excess soils may be generated that can be used in other locations that require fill material for redevelopment activities to occur.

and concentrations of PCBs identified in any regulated fill brought to the Bethlehem Site – none of which contains PCBs at concentrations exceeding 10 ppm)[4] - this material either (1) qualifies as an excluded PCB product, or (2) is simply not regulated at all by TSCA (fill with PCBs at concentrations of less than 50 ppm that resulted from a pre-1978 release). This determination fits squarely with EPA's underlying analysis which determined that the incremental risks associated with the distribution and use of materials containing PCBs at concentrations up to 50 ppm are outweighed by the "tremendous costs" that would be incurred by banning the use of such materials.

The fact that any regulated fill accepted at the Bethlehem Site falls outside the scope of TSCA does not mean that the regulated fill escapes all regulation. Instead, the regulated fill is subject to non-TSCA regulatory requirements under state law. As described earlier in this submission, PADEP regulates fill material containing PCBs under the SWMA and its *Management of Fill Policy*. By classifying fill material that will be beneficially used as either clean fill or regulated fill, and by regulating the use of certain fill material on residential and nonresidential sites (with regulated fill only being permitted for reuse on nonresidential sites), PADEP has struck a balance between protecting against the unreasonable risk of injury to health and the environment and the economic costs imposed by the untrammeled application of PCB use prohibitions.

As also noted earlier in this submission, regulated fill can not be imported to the Bethlehem Site until an authorization is secured from PADEP for the fill material proposed for importation, after careful review and assessment of a thorough package of information that is submitted to PADEP regarding the proposed fill source. In addition to the scrutiny undertaken by PADEP in connection with granting authorizations for fill sources under the Regulated Fill Permit, extensive due diligence is undertaken by BE prior to even considering a possible fill source to be imported to the Bethlehem Site. As part of this due diligence, the owner/ generator of the proposed fill source is required to complete and submit a signed application to BE or its engineer, and, among other information, the application must include the following: the name of the owner of the fill source; the fill source project name and overall project scope; the fill source location; a detailed history of the originating site; a description of the activities generating the fill material; the fill material type and quantity; and any known or suspected sources of contamination potentially impacting the fill material. In addition, the owner/ generator must provide BE with any available analytical data relating to the fill material.

Other non-TSCA programs regulate the use of certain PCB materials and achieve objectives similar to those of TSCA. EPA, for example, has the authority to manage PCB-containing sewage sludge under the Clean Water Act and the Resource Conservation and Recovery Act. 53 Fed. Reg. 24206, 24208 (Jun. 27, 1988). As a result, land application of sewage sludge (i.e., the use of sewage sludge as a nutrient and soil conditioner) containing PCBs

[4] Although clean fill was brought to the Bethlehem Site, no clean fill contained PCBs in concentrations of 2 ppm or greater.

at concentrations of less than 50 ppm is authorized under 40 C.F.R. § 761.20(a)(4) as a use in accordance with Section 6(e) of TSCA.

Responses to Specific Information Requests Contained in the Notice

In the Notice, EPA requests information concerning the use of "PCB-contaminated soil in materials as construction materials" at the Bethlehem Site. BE responds to each of EPA's information requests below. For completeness and ease of review, each request is provided below in italics followed by BE's response.

Request No. 1: Provide copies of each New Source application submitted to the Pennsylvania Department of Environmental Protection (PADEP) as required under your Beneficial Use Permit WGR096NE004 which included PCB-containing materials of PCB concentrations of 2 ppm or greater. Provide the dates you or to Bethlehem Earth Easton Road site accepted these PCB-containing materials.

Response:

A total of ten (10) regulated fill sources containing PCBs at concentrations of 2 ppm or greater were submitted to PADEP for authorization to be accepted at the Bethlehem Site pursuant to the Regulated Fill Permit; however, regulated fill from only six (6) of these sources was ever brought to the Bethlehem Site, and none of the fill that was accepted at the Bethlehem Site contained PCBs at concentrations of 10 ppm or greater. The ten (10) sites that received PADEP authorization are as follows:

(1) DRP Gibbstown Logistics, Gibbstown, New Jersey ;
(2) PANYNJ Greenville Yard, 20 Colony Road, Jersey City, New Jersey;
(3) Construction & Marine Equipment Co. (CMEC), 330 S. Front Street, Elizabeth, New Jersey;
(4) Victor Balata Belting Company (Redcom), 118 South 25th Street, Easton, Pennsylvania;
(5) La Central Building B, 600 Bergen Avenue, Bronx, New York;
(6) Former Honeywell Global Headquarters, 101 Columbia Turnpike, Morristown, New Jersey;
(7) Komline Sanderson Tract (High Bridge), 1 Washington Avenue, High Bridge, New Jersey;
(8) PVSC Facility & Former Witco Maintenance Dredging Project, Newark Bay, Newark, New Jersey;
(9) 19-25 Kent Avenue, Brooklyn, New York; and
(10) Gateway Estates Application #8, Vandalia Ave. between Gateway Drive and Elton Street, Brooklyn, NY.

A copy of each application can be found in the attached disk, as well as (except for the PANYNJ Greenville Yard) at the following link: https://cleanearthinc.sharefile.com/d-sb63a47elde6401f8 .

Although ten sources of regulated fill were submitted to PADEP for approval, it should be noted that fill material associated with a number of the applications was never accepted at the Bethlehem Site and/or the sample areas with PCBs greater than 2 ppm were not accepted at the Bethlehem Site. Sources that were approved, but did not ship soils containing PCBs at concentrations of 2 ppm or greater consist of the following: DRP Gibbstown Logistics, PANYNJ Greenville Yards, 19-25 Kent Avenue, and Gateway Estates Application #8.

Sources of regulated fill used at the Bethlehem Site containing PCBs at concentrations of 2 ppm or above are identified in the spreadsheets attached hereto as Exhibit C. The spreadsheets include: the sample identification numbers; the dates of receipt of regulated fill; the approved volumes; and the volumes actually shipped to the Bethlehem Site.

Request No. 2: Provide copies of each FP-001 Application submitted to the PADEP as required under the Clean Fill Policy which included PCB-containing materials with PCB concentrations of 2 ppm or greater. Provide the dates that you or the Bethlehem Earth Easton Road or the Burnside Associates Freemansburg Sites accepted these PCB-containing materials.

Response:

As stated earlier in this submission, BE never owned nor operated the Freemansburg site, and therefore BE limits its response to this question to the Bethlehem Site. BE has not accepted any clean fill for use at the Bethlehem Site with concentrations of PCBs at 2 ppm or greater. Similarly, BE never submitted any FP-001 forms to PADEP which included sampling information showing PCBs to be present at concentrations of 2 ppm or greater.

Request No. 3: Provide the number of total number of PCB-containing materials in PCB concentrations of 2 ppm or greater that has been placed at the Bethlehem Earth Easton Road Site in Bethlehem, PA.

Response:

See the spreadsheets attached hereto as Exhibit C.

Request No. 4: Provide a site map or schematic that describes and specifies the location, including latitude/longitude coordinates of each cell or other specified unit, or PCB-containing materials of PCB concentrations of 2 ppm or greater has been used as either construction material under PA Beneficial Use Permit WMGR096N004 or as clean fill under the PADEP

Clean Fill Policy. Include information related to the depth of this material if it has been buried, including description of the overburden or cap material.

Response:

Please see the map attached hereto as Exhibit D.

Request No. 5: Describe the intended future use of the property where PCB-containing materials of PCB concentrations of 2 ppm or greater has been placed in the anticipated timeline for that intended future use. Include any information related to the potential sale, transfer or other conveyance of the property.

Response:

As noted above, BE plans to redevelop the Bethlehem Site into 66 buildable acres, along with the construction of three industrial buildings and associated infrastructure. The largest of the three buildings is anticipated to be approximately 400,000 square feet in size. A site plan depicting the proposed industrial development is attached as Exhibit B. To complete the redevelopment of the Bethlehem Site, approximately 4,500,000 tons of fill, consisting of both clean fill and regulated fill, will need to be imported to the Site, with some portions of the Bethlehem Site requiring the placement of more than 60 feet of fill material to achieve level, final construction grades. The Bethlehem Site is zoned for commercial and industrial use, and sits immediately adjacent to the Majestic Bethlehem Center, a 441 acre master planned intermodal and business park.

Fill importation is scheduled to occur until 2023, with commercial development to commence subsequent to the completion of fill importation, for a period of two to five years.

Request No. 6: Provide any documentation related to deed notices, deed restrictions, land use covenants, and any other institutional controls as they relate to locations where PCB-containing materials of PCB concentrations of 2 ppm or greater were placed.

Response:

In accordance with the requirements of the Regulated Fill Permit, BE is only permitted to use the Bethlehem Site for commercial redevelopment purposes. Further, the zoning where the Bethlehem Site is located limits use of the Bethlehem Site for non-residential purposes. In addition, as required pursuant to the Regulated Fill Permit, a deed acknowledgment will be recorded for the Bethlehem Site that contains the locations where regulated fill has been placed. The deed acknowledgment will include the longitude and latitude of the locations where regulated fill has been placed, and a description of the types of fill identified by sampling and analysis. The deed acknowledgement will be recorded upon the completion of the redevelopment project.

Our responses to EPA's request for information as set forth herein are based on the information that is currently available to us and we reserve our rights to supplement, modify or amend this submission if we become aware of new or additional relevant information. Nothing in this response is intended to waive, restrict or otherwise impair any arguments or defenses to liability under TSCA or otherwise, and we hereby expressly reserve our rights and ability to raise any and all such arguments and defenses.

In addition to the information contained in this letter, representatives of BE request an in-person meeting with EPA to discuss the Notice and our responses. I will contact you in early June with the goal of scheduling such a meeting. In the meantime, should you have any questions to this letter, please do not hesitate to contact me.

Sincerely,

Jonathan H. Spergel
For MANKO, GOLD, KATCHER & FOX, LLP

JHS/pa
Enclosures
cc: Mr. George Hartenstein,
Deputy Secretary of Waste, Air, Radiation and Remediation
Pennsylvania Department of Environmental Protection
Mr. John Tallarico, Bethlehem Earth, L.P.
Mr. Scott Homel, Bethlehem Earth, L.P.
Jonathan Spergel, Esquire, Manko, Gold, Katcher & Fox, LLP
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